

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

:

v.

: CRIMINAL NO.

3:00CR217(AHN)

TRIUMPH CAPITAL GROUP, INC. ET AL.

:

RULING ON THE GOVERNMENT'S MOTION RE: ORDER TO PRECLUDE THE
TESTIMONY OF IDENTIFIED GOVERNMENT TRIAL WITNESSES

The Government's Motion Re: Order to Preclude the Testimony of Identified Government Trial Witnesses [doc. # 212] is GRANTED. The defendants are not entitled to a Franks hearing and may not call Paul Silvester ("Silvester") or Christopher Stack ("Stack") as witnesses at the suppression hearing to establish their claim that the search warrant affidavit contained material and deliberate omissions or that the totality of the circumstances did not present exigent circumstances justifying the issuance of the forthwith subpoena.

Under Franks v. Delaware, 438 U.S. 154 (1978), a defendant is entitled to a hearing to challenge the sufficiency of an affidavit only upon a substantial preliminary showing that (1) the affidavit contained false statements or omissions made knowingly, intentionally or with

reckless disregard for the truth; and (2) the challenged statements or omissions were necessary to the Magistrate's probable cause finding. See id. at 155-56. Franks does not require all statements in an affidavit to be true; it simply requires that the statements be believed or accepted as true by the affiant. See United States v. Campino, 890 F.2d 588, 592 (2d Cir. 1989) (citing Franks, 438 U.S. at 165). Accordingly, the focus is on the veracity and intention of the affiant. See United States v. Trzaska, 111 F.3d 1019, 1028 (2d Cir. 1997). A defendant has no right to a hearing to challenge information provided by an informant or other source. See Franks, 438 U.S. at 171.

In addition, as the Second Circuit has further explained, under the second prong of the Franks standard, "the defense motion must be denied without a hearing if, after setting aside the allegedly misleading statements or omissions, there remains a residue of independent and lawful information sufficient to support probable cause." United States v. Levasseur, 816 F.2d 37, 43 (2d Cir. 1987) (quoting United States v. Ferguson, 758 F.2d 843, 849 (2d Cir. (1985))).

The affidavit of Charles Spadoni ("Spadoni") simply does not constitute a substantial preliminary showing that Special Agent Urso ("S.A. Urso") made any knowing, intentional or

reckless omissions in the search warrant affidavit or that the alleged omission was material.

The assertion that S.A. Urso must have known from his interviews of Silvester that Spadoni told Silvester that "he had received a legal opinion concluding that it would be legal [under the Connecticut Revolving Door Statute] for Triumph to engage Park Strategies to make contacts with potential investors other than the Connecticut State Treasurer's office" is nothing more than an unsupported, conclusory assumption. It does not establish that S.A. Urso knew this fact, nor does it permit an inference that S.A. Urso recklessly or intentionally omitted this fact from his affidavit to create a misleading implication concerning Spadoni's state of mind. Such speculation is far from sufficient to satisfy the requirements of Franks and does not provide a valid reason to allow the defendants to call Silvester to establish their claim that the search warrant affidavit was drafted with deliberate or reckless disregard of the truth. See Franks, 438 U.S. at 171 ("the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine").

The defendants have also, and perhaps more significantly, failed to establish that any alleged omission was material to

the Magistrate Judge's determination of probable cause. See United States v. Canfield, 217 U.S. 713, 718 (2d Cir. 2000) (holding that where the alleged inaccuracies are not material to the probable cause analysis the court need not determine whether they were the product of intentional or reckless falsehoods or disregard for the truth). To the contrary, the affidavit provides ample facts and information to support a finding of probable cause that Spadoni's laptop computer contained evidence that Spadoni intentionally, and in anticipation of further grand jury subpoenas, deleted documents that showed a contractual relationship between Triumph Capital, Paul Silvester, Park Strategies and Ben Andrews. The additional fact that Spadoni had obtained a legal opinion and thus believed that a contract between Triumph and Park Strategies would not violate Connecticut's revolving door statute would not have changed or influenced the Magistrate Judge's determination that there was probable cause to believe that the computer contained evidence that the specified federal criminal laws had been violated.

Finally, neither Silvester's nor Stack's testimony is necessary to establish whether or not the totality of the circumstances established exigent circumstances justifying the issuance of the forthwith subpoena. Such circumstances can be

established by examination of S.A. Urso, who can be questioned, inter alia, as to what he knew and when he knew it.

For the foregoing reasons, the government's motion to preclude the testimony of Silvester and Stack [doc. # 212] is GRANTED.

SO ORDERED this 17th day of October, 2001, at Bridgeport, Connecticut.

Alan H. Nevas
United States District Judge